IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~691~~ 70-39

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

PITTSBURGH PLATE GLASS COMPANY,
CHEMICAL DIVISION, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE*
BY UNION CARBIDE CORPORATION

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Opinions Below

The opinion of the court of appeals is reported at 427 F. 2d 936. The decision and order of the Board are reported at 177 NLRB No. 114 (App. D, pp. 23-55).

Jurisdiction

The judgment of the court of appeals (App. B, p. 21) was entered on June 10, 1970. The Board's timely petition for rehearing en banc was denied (Judges Edwards and McCree dissenting) on July 31, 1970 (App. C, p. 22). On

October 16, 1970, Mr. Justice Stewart extended the Board's time for filing a petition for a writ of certiorari to and including November 16, 1970. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Statutes Involved

The relevant statutory provisions are set forth in the Appendix, *infra*, pp. 43-47.

Questions Presented

(1) Does Section 8 (a) (1) and (5) of the National Labor Relations Act as amended require an employer to bargain with a union for individuals who are not employees as that term is defined in the Act?

(2) Whether the National Labor Relations Act requires bargaining on the subject of benefits for retirees after they have shed their employee status where practice in large segments of industry is not to bargain over such subjects.

Statement

UNION CARBIDE CORPORATION hereby submits a brief in this proceeding as amicus curiae in support of the position taken by the Respondent, PITTSBURGH PLATE GLASS COMPANY, CHEMICAL DIVISION, and in demonstration of its interest in this matter states as follows:

1. Union Carbide Corporation was incorporated in the State of New York in 1917. It is engaged in the manufacture of chemicals and other industrial products and it operates throughout the forty-eight continental states of the United States and elsewhere throughout the world.

Union Carbide Corporation has approximately 71,600 employees in the continental United States, of

whom about 37,300 are hourly paid. Approximately sixty-nine percent of such hourly paid employees are represented by a wide variety of unions for the purpose of collective bargaining, with whom Union Carbide Corporation has entered into more than one hundred collective bargaining agreements. All employees, both hourly and salary, are covered under a variety of benefit plans.

2. Negotiations have been conducted periodically with the various unions representing Union Carbide Corporation employees with respect to employee benefit plans. However, such bargaining has never taken place for any individuals except active employees on current payrolls. Union Carbide Corporation has not engaged in collective bargaining with any union as to installation, alteration or change of any benefit for retirees after they have left Union Carbide Corporation's employ. Such a practice is common in the chemical and allied industries; it is one which similarly characterizes the posture of numerous companies in every field of American industrial and business endeavor. It is a practice, moreover, which many unions have not yet sought to change or alter or intrude into the bargaining relationships between themselves and their employers. It is Union Carbide Corporation's knowledge and experience that the *absence* of bargaining over retirees' benefits after retirement is far more common than its presence, and the instant petition to reverse the court below is not supported by normal industrial practice. Moreover, Union Carbide and many other employers have never regarded such matters as subject to mandatory bargaining under the National Labor Relations Act. If the National Labor Relations Board succeeds in imposing such obligation on employers generally, contrary not only to the clear language and explicit intent of the Act, but also to the "customs, habits and usages" of a substantial number of companies throughout American industry, Union Carbide Corporation and many others similarly situated would be required to alter a uniform practice of many years' standing, never challenged at any previous time, formally or informally. The

result would be moreover, to create a chaotic condition nationally which would force employers to bargain with unions for two categories of individuals whose basic interests are decidedly dissimilar and, indeed, are in basic conflict. Retirees cannot and do not have any mutual interest with active employees in numerous matters embracing all customary subjects of bargaining concerning wages, hours, and other terms and conditions. Active employees have nothing in common with and no concern over any benefits accorded retirees, and the results of such forced bargaining on employers generally will be to proliferate disputes; prevent ready settlement of bargaining negotiations; increase the liklihood of strikes and picketing; and surely contribute added burdens on interstate commerce.

3. Union Carbide Corporation respectfully submits that it subscribes to the argument advanced by the Respondent in its brief, and submits further that the information and argument contained in the body of its brief below may assist this court in its consideration of the case.

4. The following brief, amicus curiae, is filed as provided in Rule 42. Written consent of the Solicitor-General on behalf of Petitioner, and of the Respondent to the filing of this brief has been secured, as required by Rule 42.

5. The findings of fact, and the decisions of the Board and the Sixth Circuit Court of Appeals reversing the Board's ruling are fully set forth in the briefs of the other parties hereto and the record, and need not be repeated here.

ARGUMENT

Introduction and Summary of Argument

Conceding that employers and the unions who represent their active employees are required under the Act to bargain over pension and insurance benefits to be given such individuals after they retire from employee status does not alter the fact that such individuals doff their employee status when they retire from employment as surely as when they leave employment in other ways, such as, layoff, quit, termination, etc. The Act no longer applies to them in any way, since they no longer come within the definition of "employee" in Section 2(3) thereof for any purpose whatsoever.

Consequently, no retiree can claim any right under the Act against his former employer, nor can a union invoke it on his behalf where such individual has no standing to come within the ambit of the Act. The legislative history of the statute clearly attests to the intent of Congress not to include retirees under the scope of Section 2(3), as do previous long-standing decisions of the Board which explicitly deny employee status to a retiree for union representation purposes.

Moreover, the bargaining obligation of an employer extends, under the specific language of the Act, only to representatives of "his employees." Clearly and beyond question, a retiree is one who has severed his connection with his former employer, and, by definition, is not and cannot ever again be one of "his employees." The Act imposes no duty on the employer to bargain with any union as to any matter unless the union represents, and the matter concerns, those currently employed within the certified or recognized bargaining unit. Any attempt of a union to bargain for anyone else is properly refused by the employer, who need negotiate only within the scope of his statutory obligation.

Retirees are not left remediless against a former employer who seeks to deprive them of any rights to any benefits that may have accrued to or been furnished them after retirement. They may enforce these obligations in the courts through well-established forms of action both legal and equitable, and need no additional remedy arbitrarily grafted onto the Act by an expansionist administrative agency.

Including retirees as employees, moreover, would violate the basic purposes of the Act which are aimed at protecting "workers." This purpose rests on Congress' unquestioned right to legislate on matters affecting interstate commerce. But what retirees do or do not do on retirement has no effect on commerce; has no bearing on the promotion of industrial peace, a major purpose of the Act; and reasonably cannot affect the course of bargaining at any plant location. There is no visible, overall industrial practice to bargain on behalf of retirees with unions representing active employees, and there is no mandate under the law for the Board to change such practice by administrative enlargement of the Act into an area Congress itself clearly did not cover.

I. The Act Does Not Require an Employer To Bargain With a Union on Behalf of Individuals Who Are Not Employees.

Much of the argument of the National Labor Relations Board in support of the effort by the Board to reverse the court ruling below in this matter addresses itself to the question of whether the subject-matter of benefits for individuals who have already retired may be the subject of mandatory bargaining under the National Labor Relations Act. Such arguments obviously place the cart before the horse; no collective bargaining is required by the Act of any employer on any subject-matter whatsoever with respect to

any individual who is not an "employee" within the meaning of Section 2(3) of the Act at the time such bargaining is sought.

The Court below regarded such a conclusion as self-evident; the contrary decision by the Board is a perfectly obvious attempt to exercise by administrative interpretation the legislative functions reserved to Congress which should not go unchallenged. As will appear, Congress has expressly disapproved of the Board's past efforts to extend the definition of "employee" under Section 2(3) to sweep within the ambit of the Act individuals whom the statute clearly does not, and was never intended to, cover. The Board has previously stated it will give effect only to the "plain meaning" of words used (*F. W. Woolworth,* 111 NLRB 766 (1955), and this Court should see that it does so in this matter.

As the Court below stated (*Pittsburgh Plate Glass Co.* v. *NLRB* 427 Fed 2d 936 at page 943):

> "The Labor-Management Relations Act enjoins employers to bargain collectively and in good faith with the bargaining agents of their employees about 'wages, hours, and other terms and conditions of employment.' It is well established, and not in dispute here, that pensions and insurance benefits to be enjoyed by employees after retirement are 'wages' for the purposes of the statute, albeit deferred ones, and that insofar as they accompany a provision specifying a mandatory retirement age, as is present in this case, they are also 'conditions of employment'." *W. W. Cross & Company,* 77 NLRB 1162 (1948), enf'd, *W. W. Cross & Company* v. *NLRB,* 174 F. 2d 875 (1st Cir. 1949); *Inland Steel Company,* 77 NLRB 1 (1948), *enf'd, Inland Steel Company* v. *NLRB,* 170 F. 2d 247 (7th Cir. 1948), *cert. denied on this issue,* 336 U. S. 960; *National Labor Relations Board* v. *Black-Clawson Company,* 210 F. 2d 523 (6th Cir. 1954).
>
> "However, the issue in this case is not whether retirement benefits for *active* employees are manda-

> tory subjects of collective bargaining. The issue is, once retirement benefits have been negotiated for active employees who have retired and begun collecting benefits, whether an employer may propose improvements in benefits to the retirees individually, or whether retirees are 'employees' under section 8(a)(5), changes in whose benefit must be collectively bargained with the union. We find that retirees are not 'employees' within the meaning of section 8(a)(5) and that the Company was under no constraint to collectively bargain improvements in their benefits with the Union."

The results of legitimatizing any departure from such principles will be readily predictable: confusion; distortion; total lack of logic; the unwarranted imposition of burdens on employers that they were never intended to shoulder; and extending the Act into areas where the flow of interstate commerce (which the Board is required to protect under the Act) does not penetrate. The lengths to which the Board must reach in arrogating to itself the responsibility for such results are apparent. Its petition boils down to an effort to claim that an individual who may have at one time enjoyed "employee" standing must continue to fall within the Section 2(3) definition of employee after he has shed such status. Such a proposition is demonstrably absurd.

A. Only Employees Are Given Rights Under The Act.

Section 2(3) of the National Labor Relations Act, as amended, reads as follows:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any in-

> dividual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

This definition clearly is a limited one; it does not in any sense, nor by its terms, include an individual whose employee status has ceased *except* where it has done so as the result of an unfair labor practice. The fact that only an individual "whose work has ceased" for one reason only continues to enjoy employee status for purposes of the protection of the Act is clear indication that Congress has specifically excluded any person whose work had ceased for any other reason from retaining employee status. An individual whom Congress has omitted cannot possibly be subjected to the Act by the Board through mere interpretation. The question is not whether an individual comes within the specific *exclusions* of Section 2(3); the question is whether an individual such as a retiree who is simply not an employee under either the Congress' intendment; or any reasonable conception of the term, can be made into one by virtue of his previous status which he has legitimately shed.

The point is, of course, that only employees have been accorded rights under the Act with respect to their employers. Non-employees do not have such rights. Indeed, the Board has frequently taken this position as to individuals in such non-employee status, even though some residual connection with their former employer still remains. See, for example, *Sullivan Surplus Sales,* 152 NLRB 132 (1967), where "employees" on indefinite leave of absence, whose return was within their own discretion, were held not to be employees under Section 2(3).

This is a fundamental matter imperfectly understood—or at least imperfectly articulated—by the Board. However, it can and should be bluntly stated at the outset that

an individual who is not an "employee" does not have the protection of nor is accorded any rights under the Act whatsoever. Section 7, which is the heart of the NLRA, states clearly that:

> "*Employees* shall have the right to self-organization, to form, join, or assist labor organizations, to *bargain collectively through representatives of their own choosing,* and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. (Italics ours)"

Plainly, no one who is not an "employee" as that term is defined in Section 2(3) of the Act can claim any right thereunder (regardless of the rights or protection available to him in other connections). No such individual can assert the right to bargain collectively, nor can any one assert it on his behalf so far as this Act is concerned. No such individual can claim the protection of the Act in respect to any activity whatsoever, concerted or otherwise, in which they may engage.

This is not a particularly startling concept; the Board has often expounded it with regard to such individuals as supervisors; employees of state or municipal governments; or of the railroads; agricultural employees; and others where, once the non-employee status of such particular individuals has been established, the Board has had no trouble in regarding them as wholly outside the Act's umbrella. See, for example, *Arkansas Valley Industries,* 167 NLRB 47 (1967) (agricultural laborers not employees); *Akron Engraving Co.,* 170 NLRB 22 (1968) (supervisor not employee); *Capital Transit Co.,* 114 NLRB 617 (1955) (discussing Board principles as to supervisors), *Civilian Cafeteria Board,* 106 NLRB 208 (1953) (government employees); *Goodyear,* 112 NLRB 30 (1955) (railroad employees).

B. Loss of Employee Status For Legitimate Reasons Customarily Terminates Employer Bargaining Obligations to Such Employee or Unions.

No one reasonably contends that an employer must bargain over terms and conditions of employment of an individual promoted even temporarily from the bargaining unit to a supervisory position at the same location, *Frank G. Shattuck Co.*, 106 NLRB 838 (1953); *U. S. Gypsum Co.*, 114 NLRB 523[1] (1955). The reason is clear; such an individual is no longer an "employee" within the meaning of Section 2 (3) of the Act. The same principle has frequently been applied to individuals who have been laid off or terminated from employment; no obligation whatever exists requiring any employer to bargain over the post-employment terms, conditions or status of such former employees, *Thomas Electronics, Inc.*, 109 NLRB 1141 (1954). Decisions that appear to be contrary are in fact in accord with such a basic proposition.

Thus, the thrust of various rulings beginning with *Phelps Dodge* v. *NLRB* 313 U. S. 177 (1941), as clearly restated by the Court below in construing Section 2(3), either affects solely individuals who would have been employees but for an employer's unfair labor practices, or is strictly limited to bargaining over terms and conditions of entry into, or departure from, the bargaining unit, or employee status during the individual's sojourn in the unit. Terms and conditions of entry to or departure from employment are clearly a legitimate subject of bargaining for employees currently employed. So is the setting of terms and conditions of work that will affect individuals who are prospective employees *after* they will have become employees. The terms, conditions and benefits negotiated for an employee *while he retains that status* are bargainable even though the actual realization of such benefits is deferred.

[1] Declaring as supervisors and not "employees" certain individuals who regularly substituted for foremen for parts of a week, even though they were bargaining unit employees at other times.

However, not one case or decision by the courts or the Board can be found that has ever required an employer to bargain with any union over the status of an employee before or after he has undertaken or left his employment. Even the *Chemrock* holding, 151 NLRB 1074 (1965), that a successor employer must bargain with the union representing his seller's employees in some circumstances is based on the concept of the retention of employee status; it relies on the continued existence of the bargaining unit, despite a change of employers.

The language of the Act itself is crystal clear in its limitations in this area. Section 8 (a) (5) merely requires an employer to bargain with a representative of *his* employees. The Board will not certify as an appropriate bargaining representative a union which purports to bargain not only for employees, but also for non-employees. Thus, the Board does not certify unions which include supervisors (who are clearly not employees under the Act's definitions) and non-supervisors; or which represent both guards and non-guards, *A. D. T. Company,* 112 NLRB 80 (1955). Section 9 (a) of the Act, moreover, requires employee representatives to be selected by "employees" in an appropriate unit to represent such "employees" and no one else. It follows, and the Board and the courts have often and consistently so ruled, that a bargaining agent which represents both employees and non-employees need not even be recognized by the employer for purpose of bargaining, let alone dealt with over the negotiating table, *Douds* v. *International Longshoremen's Association,* 241 Fed 2d 278 (CA 2, 1957); *United Mine Workers* v. *Pennington,* 381 U. S. 657 (1965), *Ainsworth Manufacturing Company,* 131 NLRB 273 (1961). No other signficance can possibly be or has been ascribed to the language and structure of the Act. It follows that a union purporting to bargain for "non-employees" cannot invoke the protection of the statute any more than the non-employees. Such a union would be endangering its very unit certification, and its representation and bargaining rights.

Where retirees are not employees under Section 2(3), they have no rights at all under the Act; an employer need not bargain as to them with any union whatsoever, let alone a union which merely represents his own employees in an appropriate unit which excludes retirees. None of the provisions of the Act inhibit or prescribe the employer's relationship to such persons. Absent such statutory obligations to such individuals, there is no public interest that the Board or this Court may enforce in this case.

It is, then, of crucial importance in this matter to determine who are and who are not employees under Section 2(3) of the Act. A finding that retirees are not employees would automatically absolve the employer from any obligation to bargain with the union.

II. The Term "Employee" Under Section 2(3) of the Act Does Not Include a Retiree.

We have already seen that Section 2(3) of Act defines the term "employee" to include former employees only where their work has ceased as the result of an unfair labor practice, and does not include former employees whose work has ceased for any other reason. No claim is made that the individuals here involved ceased work for any but wholly lawful reasons. No claim is made that the individual retirees here are encompassed within the normal definition of the term employee spelled out in all dictionaries as one who *works* for a wage or salary for an employer. There is, in truth, not even a claim that these individuals are members of the working class, generally; indeed, their very status of "retirement" is the complete negation of any reason to ascribe employee status to such individuals.

In the face of such an undisputed situation, what warrant can possibly be found for avoiding the rational use of the English language, and failing to apply the plain meaning of the term employee. The warrant is not found in the language of the present Act. Nor, indeed, is it even found in the language of the original statute.

True, under the National Labor Relations Act, as passed in 1935, the term "employee" in Section 2(3) is simply defined as:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

Perusal of the Board's position reveals that it has been relying on a return to such language by way of "avoidance" of what is euphemistically called a "narrow definition" of the term employee. The Board would include in it an individual as to whom it conceded in its decision below "most of the threads that once bound him to the bargaining unit are severed" and he retains merely "retirement rights." The Board claims reliance on "the realities of human behavior," and "national policies (citing the Clayton Act) which reject the view that workers are human machines," as justification for its redefinition of the term "employee." It cites as supporting this essentially non-legal view solely the case of *NLRB* v. *Hearst Publications,* 322 U. S. 111 (1944) decided under the 1935 version of the Act. However, this opinion no longer can support the Board because the Court's ruling in that case was specifically rejected by Congress in 1947 which disapproved the Board's seeking to do exactly the same sort of thing it is trying to do here. Neither the Board nor the Court can ignore such an unmistakable expression of Congressional intent.

Indeed, even *Hearst* is no warrant for casual expansion of the term employee to include retirees. This decision, even prior to Congressional disapproval, was no blank check to reinterpret the Act. This Court was not therein

concerned with making a retiree into an "employee" but in ensuring that a broad definition of what constitutes an actual *work* relationship was followed, such that employers could not escape bargaining obligations as to its *workers* by misuse of the term "independent contractor." The Court quite obviously did not mean to establish in "employee" status one who enjoys no working relationship with the employer at all.

A. Congress in 1947 Disapproved Broad Use of Term Employee.

The language added by Congress, when considering the 1947 Labor-Management Relations Act amendments to the original 1935 National Labor Relations Act, specifically disapproved of the broad sweep to the term "employee" that was enunciated in *Hearst*. It did so in language which beyond question set forth its intent as to the scope to be given the term "employee" as used in the Act. The enactment of the Act with Congressional disapproval of *Hearst* is binding under fundamental terms of statutory construction that need not be labored here.

Specifically, Congress said (H. Rept. 245 on HR 3020 at p. 17):

> "In the case of *NLRB* v. *Hearst*, the Board expanded the definition of the term "employee" beyond anything that it had ever included before and the Supreme Court, relying on the theoretic 'expertness' of the Board, upheld the Board . . . it must be presumed that when Congress passed the Labor Act it intended words to have the meanings they had when Congress passed the Act, not new meanings that the Labor Board might think up 9 years later. In the law, there has always been a big difference between employees and independent contractors. *"Employees" work for wages and salaries.* . . . It is inconceivable that Congress when it passed the Act, authorized the Board to give to every word in the Act whatever meaning it wished. On the contrary, *Congress intended then and it intends now that the Board give to words not far-fetched meanings but ordinary meanings."*

The fact that the Board still (p. 22 of its brief) cites *Hearst,* despite such disapproval, as the only Court buttress of its case, beyond peradventure shows the poverty of its case.

The House passed HR 3020 with the exact definition of "employee" fashioned in the House Labor Committee. After favorable action by the Senate on its companion bill, the differences were adjusted in conference. The Conference Report followed and adopted the House Report language and the provisions of its bill with respect to the language of Section 2(3), which in turn became the final version of the LMRA as it was enacted in 1947. The House language above has become inescapably embedded in the law, and cannot be lightly cast aside as the Board now intends.

It is thus quite clear that Congress intended the term "employee" in Section 2(3) to be given its ordinary meaning in the administration of the Act. It disapproved clearly and specifically any extension of that meaning.

The ordinary meaning of the term "employee" then, which Congress specifically required the Board to apply, is clear: An employee is defined in Webster's Standard Dictionary as:

> "One who works for wages or salary in the service of an employer."

B. Neither the Board nor the Courts Have Held a Retiree to be an "Employee."

No amount of circumlocution will alter the wholly unmistakable fact that retirees simply do not and cannot come under the dictionary definition. Any other result would plainly contradict the bluntly-expressed intent of Congress, which the Board has obviously overlooked in its haste to do the very thing that Congress has cautioned it against doing. See *NLRB* v. *Steinberg & Co.*, 182 Fed 2d 850 (CA 5, 1950) where the court said:

> "As in the Social Security Act and the Fair Labor Standards Act, the term "employee" is not defined

> in the National Labor Relations Act and the authorities have been at variance in the past as to the "test" to be applied in determining whether or not an employment relationship exists under this and similiar remedial legislative acts. However, the legislative history of the Taft-Hartley Law, which was adopted in 1947 as an amendment to the National Labor Relations Act, shows quite clearly that when Congress passed the Labor Act it intended the word "employee" to mean someone who works for another for hire and this clear expression of Congressional intent we are obligated to follow."

The 5th Circuit Court of Appeals agreed that the clearly-expressed intent of Congress should be followed. We submit that this decision represents the fundamental legal principles that must be applied here. See *NLRB* v. *Phoenix Mutual Life Ins. Co.*, 167 Fed 2d 983 (CA 7, 1948) cert. den. 335 US 845 (1949).

Nothing has been adduced in the other federal circuit court rulings, heavily relied on by the Board as purporting to show language which defines the term "employee" to include a retiree. A careful reading of the complete decisions in these cases makes it clear that the court was in each instance concerned not with the term "employee," but whether the term "beneficiary" of a welfare fund trust was restricted or could, under Section 302(c)(5) of the Act, include a retiree enjoying the trust benefits established for him when he had employee status under Section 2(3), in contemplation of his retirement from such status, and which were to be maintained by contributions of the employer without regard to his "employee" status.

Blassie v. *Kroger*, 345 Fed 2d 58 (CA 8, 1965); *Teamsters Local 688* v. *Townsend*, 345 Fed 2d 77 (CA 8, 1968) and *Garvison* v. *Jensen*, 355 Fed 2d 487 (CA 9, 1966) are related cases, of which the initial ruling is in *Blassie*; the other two follow only in part the main ruling. These are adduced as holding that, for purposes of Section 302 of the Act, the term "employee" is intended to include both cur-

rent and retired employees. Hence, it is reasoned, the same definition would govern Section 2(3). The Board has grossly distorted the effect of these cases; they in no sense whatever even define the term employee. Indeed, *Blassie* rules that an individual who has retired and for whom no contributions were made to the welfare plan trust prior to retirement cannot be a beneficiary thereafter. *Garvison* saw no prohibition in Section 302 against such contribution.

The court in *Blassie* does devote a portion of its opinion to resolving the question of "Retired Persons as Beneficiaries," 345 Fed 2d, at p. 68, yet the same court also, a few lines farther on, flatly states that

> "An employee ordinarily is a person presently engaged in active employment. He is "one employed by another; one who works for wages or salary in the service of an employer." Webster's Standard Dictionary (1960 2d Ed. p. 839)."

The court then concluded that benefits of the trust need not be "confined in their enjoyment to the period of the employee's active employment . . . Our conclusion is that retired persons may be beneficiaries." The court made it quite clear that its remarks were confined solely to the question of retirees as beneficiaries; it was not even asked to consider the question of whether they were employees under Section 2(3), let alone the question of whether the employer was obliged to bargain with their former union on their behalf after they had been severed from employment via retirement.

The other companion cases are devoted to the same issue. They, no more than *Blassie,* can be cited in support of mandatory bargaining by an employer as to retirees. As the Court below said, in rejecting the attempt to label *Blassie* as relevant to this instant case (147 Fed 2d 936 at 948):

> "We are similarly unpersuaded by the analogy made by the Board between the word "employee"

as that word has been construed for the purposes of Section 302 of the Labor-Management Relations Act, 29 U. S. C. § 186 (1964), *see, e.g., Blassie* v. *Kroger,* 345 F. 2d 58, 68-71 (8th Cir. 1965), and the word "employee" as it appears in Section 8(a)(5). Section 302 is a criminal provision, making it a misdemeanor for an employer to make payments to a union representing his employees. Section 302(c), under which *Blassie, supra,* was decided, exempts from the operation of the section employer contributions to, *inter alia,* employee trust funds, among which are pension and retirement plans. Not to regard retirees as employees for the purposes of that section would frustrate the purpose of retirement trusts, which have been designated as mandatory subjects of bargaining, by making distributions to retirees from them illegal. The Board's argument that it is an "anomaly" to treat the word differently under the two sections is itself an anomaly.

We also reject the Board's argument that the interpretation of the word "employee" by the Internal Revenue Service under Sections 401(a) and 501(c)(9) of the Internal Revenue Code of 1954, 26 U. S. C. §§ 401(a) & 501(c)(9) (1964), is dispositive of the issues in this case. *See* 26 CFR §-1.401, *as-revised,* Jan. 1, 1969."

C. Individuals Lawfully Severed From Employment Not Employees Under the Act.

The real hurdle posed for the Court in this case is whether or not an individual who has been lawfully severed from his employment can nevertheless continue to enjoy employee status; to remain, *as an employee,* in a bargaining unit of workers who are in an employment relationship; and to be required to deal with his former employer only through his former union. Yet a retiree stands in no different position than any other lawfully terminated employee. The Board has never considered employees who were lawfully discharged for cause and not in violation of the Act to be employees, *Booth Broadcasting Co.,* 134 NLRB 817 (1961). *Cone Mills,* 107 NLRB 866 (1954). *Vogue Art Ware,* 129 NLRB 1253 (1961).

The Board has never considered as employees individuals who have been laid off from employment for lack of work or other legitimate reason and who have no real expectation of reemployment within a reasonable future time, even though such employees remain on the employer's recall list. See *Sharco Mfg. Co.*, 112 NLRB 1519 (1955), which held a laid off employee ineligible to vote in an election even though he was subsequently rehired. "The criterion," the Board said, "is whether at the time of the election he has a reasonable expectation of reemployment as a regular employee in the foreseeable future." The fact that they have continued seniority rights does not entitle laid-off individuals to participate in voting in a representation election. *Owens-Illinois Glass,* 114 NLRB 387 (1955). *National Foundry of New York, Inc.,* 112 NLRB 1214 (1955), (employer stated he would not reinstate employee). An employee who was told he "would be rehired if feasible" was not eligible to vote in *Associated Business Service,* 107 NLRB 219 (1953).

Further, an employee absent for physical illness who had been ruled "not reemployable" by the company doctor, was held not able to vote. *A. O. Smith Corp.,* 115 NLRB 5 (1956). The Board in *Public Service Corporation of New Jersey,* 72 NLRB 224 (1947) expressed grave and substantial doubts that pensioners are employees. It said:

> "We have considerable doubt as to whether or not pensioners are employees within the meaning of Section 2(3) of the Act, since they no longer perform any work for the Employers, and have little expectancy of resuming their former employment. In any event, even if pensioners were considered to be as employees, we believe they lack a substantial community of interest with the employees who are presently in the active service of the Employers."

In *W. D. Byron and Sons,* 55 NLRB 172 (1944), the Board was even more explicit. Here, the Board stated, with respect to pensioned retirees, whom the employer had a right to recall to work but had not done so:

> "Since it appears that the pensioners have little expectation of active employment at the tannery, we shall exclude them from the bargaining unit of regular production and maintenance workers." 55 NLRB at 175.

In *J. S. Young Company,* 55 NLRB 1174 (1944), the Board excluded from the bargaining unit a retired pensioner, although he was actually employed at certain "odds and ends" work in the plant.

The main brief of the Solicitor-General on behalf of the Board concedes at page 25 that the Board currently regards and will continue to regard pensioners as excluded from the bargaining unit and so "ineligible to vote in Board election because they do not share a sufficient community of interest with active employees." Such a concession plainly negates the whole Board claim that retirees are employees.

All of the above lines of cases are distinguished by a major point of common linkage; the principle that any employee validly severed or terminated from a bargaining unit has no employee status with respect to that unit, and so cannot claim the use of the Act, regardless of the reason for severance, except in three situations; first, that he has reasonable expectation of reemployment; or second, that he was severed because of unfair labor practices; or third, he was on strike and, if the strike was economic, he had not been replaced. The bulk of such persons are, it will be discovered, those who would have attained or kept such a relationship but for the employer's unfair labor practices. Such is the basic thrust of the line of cases beginning with *Phelps Dodge* v. *NLRB,* 313 U. S. 177 (1941) and continuing through *Goodman Lumber,* 166 NLRB 48 (1967); *Local 872, ILA,* 163 NLRB 89 (1967) and *Chemrock Corp.,* 151 NLRB 1074 (1965).

But none of the above three exceptions to the rule applies to the retirees here or to retirees generally. To repeat,

no person or individual who has been *validly* severed from, or refused, employment has ever been deemed by the Board or the courts to have "employee" status after severance or prior to employment.

D. Board Violates Its Own Standards By Its Ruling In This Case.

It is, of course, correct to say that many of the above cases deal with an individual's right to vote in a representation election. It is equally correct to say that such eligibility does not always depend on employee status. But the point of the above line of cases is that the Board eliminated the retirees' eligibility to vote on the basis that such persons were not in fact sufficiently related to the bargaining unit, because of lack of expectation of future connection therewith, to be deemed employees. Employees, after all, are given in Section 9(a) of the Act the right to vote for their collective bargaining representatives; and the Board has no statutory warrant to deny them such rights unless they are not employees. Hence, the total relevancy of the findings in those cases to the instant case may be seen. In all such matters, retirees are in exactly the same situation, and (as the Board itself points out) individuals may not lack employee status under one section of the Act and acquire it under another.

Member Zagoria in his dissent in this case made precisely this point:

> "The Board did, at one time, as in *Wasson* [105 NLRB 373], make a distinction between unit inclusion and eligibility to vote. It no longer does so for reasons precisely in point here; if an employee has sufficient interests to be included in the unit, he should be given a voice in the selection of a bargaining representative; if he is not given such voice, he should not be included in the unit."

So did the Trial Examiner in his dismissal of the complaint here, in the following cogent words:

> "Further, the Board has specifically held that retired persons formerly employed in a unit are ineligi-

> ble to vote in an election to determine whether a collective-bargaining agent shall represent the employees currently working in that unit. *Taunton Supply Corp.*, 137 NLRB 221, 223 (1962); *W. D. Byron & Sons;* 55 NLRB 172, 175 (1944). If retired persons are excluded from a unit for the purpose of voting for a representative of that unit, manifestly they also should be eliminated from the unit for purposes of collective bargaining relating to employees in that unit."

The allegation in the Board's brief at page 24 that its rulings excluding pensioners from voting are not based on rulings that they are not employees is a complete misreading of the Board's own doctrines. In *Byron,* the Board clearly said that

> "We have considerable doubt that pensioners are employees under Section 2(3) of the Act."

See also the discussion regarding *Briggs,* in subsection E below.

Whom the Board really considers employees, moreover, may most readily be discerned in the numerous cases which deal with the question of whether particular individuals are employees or are independent contractors. The Board, for example, found not to be employees certain persons engaged in hauling operations for an asserted employer, who were "free to work or not as they see fit and to haul in the manner they deem best" *L. C. Sinor & Standard Industries,* 168 NLRB 67 (1968).

Indeed, the various line of cases such as *NLRB* v. *Hearst, supra* and *Houston Chapter AGC,* 143 NLRB 409 (1963), 349 Fed 2d 447 (CA5), cert. den, 382 U. S. 1026, which have dealt with the question of whether particular individuals are employees or independent contractors have all turned on the Board's long-standing "right of control" test. This itself has long defined an employee as one as to whom the employer has retained control over the method, manner and means of carrying out his employment tasks,

as opposed to mere control over the end result of such projects, which would characterize an independent contractor.

The Board cannot, it must be repeated, say that an employee is defined as one thing for one purpose and another thing for another. If the test of an employee relationship is the retained right of control, then clearly no such right has been retained for retirees. The employer has no right at all to tell retirees what to do; no right to require them to perform any services for the employer; no right to control for whom, if anyone, he works, nor any phase of his activity whatever. Based on the Board's right of control test, which is uses to determine employee status, it cannot possibly find any retiree to be an employee. The entire character of such a person, indeed, makes him the very antithesis of an employee.

E. Board Narrowly Defines Employee For Bargaining Purposes.

There has been some effort made by the Board in this case to say that an employee is "anyone in the working class," citing *Briggs Manufacturing Company,* 75 NLRB 569 (1947), because of the language of Section 2(3) stating that the term employee is not limited to employees of a particular employer. This claim plainly begs the question. Indeed, the Board itself in the *Briggs* case stated that in some contexts the term employee:

> "in its limited sense may include only the employees of a particular employer as, for example, in Section 8(5) which requires the employee to "bargain collectively" only with the representatives of *his* employees, subject to the provisions of Section 9(a)."

Briggs itself, then is authority for Respondents' position on the issue in this case, that the term employee is to be narrowly defined when it refers to the duty to bargain. Put another way, the Board itself long ago ruled that the term "employee" is *not* to be broadly defined where the mandatory duty to bargain is involved; the broad definition

for which *Briggs* is cited applies in fact only to cases of unlawful termination of an employee and so forms no precedent here.

F. 1935 Act Limits Term Employee To Individual In Work Relationship.

The legislative history of the 1935 Wagner Act makes the limited legislative intent perfectly clear. The original bill (S. 1958) was introduced by Senator Robert Wagner (D. NY). At the hearings, witness Harry G. Eldard *(1 Legislative History of NLRA, 1883)* stated that (in connection with the Section 2(3) definition of employee then proposed):

> "We are going far afield when we say an employee retains that status when he is away from his work."

The Committee Chairman (Sen. David Walsh, D-Mass.) replied:

> "I think it is meant to include an employee who is discharged from being a member of a union that his employer does not approve of . . ."

Senator Wagner then chimed in, as the author of the bill:

> "The unfair labor practices are enumerated and if he (the employee) leaves because those practices are indulged in . . . he has a right to establish that fact, and if he cannot establish that fact, he ceases to be an employee because he left without justification."

Senate Report 573, which accompanied the presentation of S. 1958, at p. 6 fully explains what was in fact the only reason Congress had in stating that the term "employee" "shall not be limited to employees of a particular employer."

> "The term "employee" is not limited to the employees of a particular employer. The reasons for this are as follows: Under modern conditions employees at times organize along craft or industrial lines and form labor organizations that extend be-

yond the limits of a single-employer unit. These organizations at times make agreements or bargain collectively with employers, or with an association of employers. Through such business dealings, employees are at times brought into an economic relationship with employers who are not their employers. In the course of this relationship, controversies involving unfair labor practices may arise. If this bill did not permit the Government to exercise complete jurisdiction over such controversies (arising from unfair labor practices), the Government would be rendered partially powerless, and could not act to promote peace in those very wide-spread controversies where the establishment of peace is most essential to the public welfare.

"The term "employee" also includes an individual whose work has ceased as a consequence of or in connection with any current labor dispute or because of any unfair labor practice, who has not attained any other regular or substantially equivalent employment. The bill thus observes the principle that men do not lose their right only to be considered as employees for the purposes of this bill merely by collectively refraining from work during the course of a labor controversy. Recognition that strikers may retain their status as employees has frequently occurred in judicial decisions. (See, for example, *Michaelson* v. *United States* (291 Fed. 940), reversed on other grounds in 266 U. S. 42.) To hold otherwise for the purposes of this bill would be to withdraw the Government from the field at the very point where the process of collective bargaining has reached a critical stage and where the general public interest has mounted to its highest point. And to hold that a worker who because of an unfair labor practice has been discharged or locked out or gone on strike is no longer an employee, would be to give legal sanction to an illegal act and to deny redress to the individual injured thereby."

It will be noted that Congress made two main points. First, the only reason given for expanding the concept of "employee" beyond its usual meaning in Section 2(3) was that organizations of *workers* sometimes extend beyond

the limits of a single employer, and collective bargaining sometimes occurs on a multi-employer basis on behalf of several groups of employees. Only for this reason, and to enable the Board to help prevent unfair labor practices where "employees are at times brought into economic relationship with employers" not their own was the qualifying phrase inserted. And, it is clear and obvious, the necessary concomitant of such a concept is in fact the existence of an employment relationship in the first place *at the time of the incident.* As already pointed out, this is hardly the sort of relationship that would encompass retirement status.

Secondly, the original 1935 bill (S. 2926) excluded from its purview the employees of small employers with under 10 people. This original exclusion was dropped in S. 1958 as reported for the reasons set forth in Senate Report 573, as follows:

> "The rights of employees should not be denied because of the size of the plant *in which they work.* And in cases where organization of workers is along craft or industrial lines, very large associations of workers fraught with great public significance may exist although all the members thereof may work in very small establishments."

Here again, it is crystal clear that Congress was thinking of an employee in the sense of a worker, not one who is retired from that status, or a former worker. As Senator Wagner said in the debates (*2 Leg. History NLRA,* p. 2400):

> "Of course the decisions of the courts, so far as I know, have generally regarded *workers* as employees even though they may be on strike." (Emphasis supplied)

Following such statement, Senators Hastings and Wagner discussed whether employees should have the rights granted them by Section 7 of the Act and exercise them *during working hours.* Senator Wagner eventually agreed that employees who did "these things" while they were working would be "subject to discharge" without fear of unfair labor practice limitations.

Here again, the whole thrust of the thinking of Congress is on the employee as a *worker*. Senator Wagner said (*1 Leg. History NLRA* p. 2336) that

> "The right of *workers* to bargain collectively through representatives of his own choosing must be matched by the correlative duty of employers to recognize and deal in good faith with these representatives." "Collective bargaining is the making of agreements to stabilize employment conditions and promote fair *working* standards." (Emphasis supplied)

The journey in the House of Representatives of a companion bill to Senator Wagner's followed much the same line as S. 1958 as the Senate. House Report No. 969 on H. R. 7978 (*1 Leg. History NLRA,* p. 2917) said that the

> "Section 2 definitions are for the most part self-explanatory. [They were the same in S. 1958 as in H. R. 7978.] The committee wishes to emphasize the need for the recognition as expressed in subsections 3 and 9, that disputes may arise regardless of whether disputants stand in the proximate relation of employer and employee, and that self-organization of employees may extend beyond a single plant or employer."

The House, just as the Senate, used the terms workers and employees interchangeably.

It is thus amply clear that the term "employee" established in the original Act of 1935 meant "worker," and, when broadened beyond a worker for one employer, meant only a worker whose employer and union were linked for bargaining with other employers and union units. It did not even once enter the head of any Congressional representative that the term would ever conceivably include someone not a worker at all.

Both Senate and House actions clearly show what Congress meant to include in its definition of the term "employee." It quite plainly did not have in mind defining the term so as to embrace a non-employee with the single

exception being where (as explicitly provided in Section 2(3)) such a person's employee status was precluded or terminated due to an unfair labor practice. The term "employee" cannot possibly include one who has been severed from employment legitimately and not in violation of the Act, and no amount of sophistic argument is going to alter the plain meaning of words. In addition to other citations, see for example *Homer Gregory,* 123 NLRB 1842 (1959) holding an employee who had quit his job not to be an employee. See also *Westinghouse Air Brake Corp.,* 119 NLRB 1391 (1958).

In other words, as the Trial Examiner below said in his dismissal of the complaint:

> "such instances of employees remaining in the unit while not actually employed therein . . . contemplate not only a continuation of the employer-employee relationship but also a resumption of or return to work in the predictable future."

G. Including Retirees As Employees Violates Basic Purpose of the Act.

Plainly, an assertion that retired persons still remain employees under the Act comports in no way with its basic purposes. The Congressional policy in the preamble to the LMRA of 1947 declares it to be the policy of the United States to protect the exercise by *"workers"* of full freedom of association, self-organization and bargaining. *"Workers"* are to be given the right to designate (for purposes of the Act) representatives of their own choosing.

The fact is that retirees are not *"workers"*. They are wholly out of the labor market and are not seeking jobs. One of the purposes of their retirement, indeed, is to avoid imposing on them the necessity of competing in any labor market in order to achieve an income on which to live. Retirees have no longer any interest in the terms and conditions of employment that obtain at their former place of employment. They are not on the payroll. They are no longer concerned in the shop issues that involve

their former colleagues who remain employees. They have no regular access to the plant, nor any hope of recall. They have no active interest in union affairs and, indeed, are not even accorded a voice in any union decisions (including the question of ratification of the collective contract). The *amicus curiae* brief of the UAW below concedes to be true that in many unions they have merely honorary, non-voting status. They do not participate or vote in union matters, any more than they participate in or are affected by changing working conditions on the work floor, or by an increase in wages or other on-the-job benefits.

There is no effect on commerce of what retirees do when retired. They cannot possibly be said to burden or obstruct commerce. They no longer need the protection of collective bargaining which does not even pertain to or interest them any more. Indeed, for them, the collective bargain has long ago been made. They are now enjoying its fruits, and are protected by the contract which, as to them, arose out of the bargaining but which no longer is subject thereto. The retirees are isolated from the mainstream of interstate commerce and far from the needs of collective bargaining. They are no longer employees; indeed, such non-employee status is implicit in their very nomenclature.

The requirement of bargaining with retirees, then, would hardly add to the expressed purposes of the Act or promote industrial peace because such bargaining, or failure thereof, imposes not the slightest burden or obstruction on commerce. The protection of retirees so ardently espoused by the Board will stem not from bargaining, but from the contractual arrangements made for them when they were in employee status in anticipation of retirement therefrom. Whether or not it is wise to reconvert them into employees, as a matter of social philosophy, so that they can enjoy alleged additional protection through union organization is not a matter for administrative or juristic interpretation of the Act. It cannot be said, as the Board's brief to this Court states (page 31), that bargaining is more "meaningful" with respect to retirees' benefits. The Board

does not anywhere specify what it means by that term which must be viewed as a mere precatory generality without substance of any sort, and certainly not a legal concept that could persuade this Court. It is a matter that is and should be left up to the Congress which is charged with the determination of such matters, and which has already expressed its displeasure at any efforts to expand the terms of the Act beyond what Congress clearly intended. Only in that way can a full and complete record be established on the basis of which action could be taken. And it can readily be stated that the record is far from one-sided on the social question.

It is true that both the Board and various *amici curiae* have expressed themselves vigorously on the desirability of including retirees within the term "employee" by misuse of administrative fiat. It may be questioned whether the interest of such advocators are fully outlined therein, or whether they would have done better to admit that a major consideration in their thinking is the expansion of union power. Indeed, there have been recent instances where the retention of retirees as union members through enforced subservience *via* welfare payments has served to perpetuate in power a union governing hierarchy that has lost touch with its active employee members; does not represent them; yet cannot be ousted because of the voting strength of retirees. There is grounds for suspicion that recent union elections in the United Mine Workers concluded as they did in favor of the union establishment solely because of the fact that retirees were permitted to vote.

Instances of such conflicting interest between employees and this category of non-employees could be proliferated. Many of them were set forth in Member Zagoria's dissent and in the Trial Examiner's decision *supra*. Other detrimental social consequences of the Board's action were reviewed and set forth by the Court below, in stating that the Board has no warrant to "artificially create or manufacture new economic forces." 147 Fed. 2d at 949. The net effect of these instances shows that arbitrary judicial and/or administrative inclusion of retirees within

the scope of the term "employee" would actually serve to frustrate the laudable purposes of the Act, not advance them. Retirees, then, have little if anything in common with active workers under Board policies which exclude them from the scope of any appropriate unit established by it for bargaining and deny them the right to vote in any representation election it conducts. *Public Service of New Jersey, supra.* How the Board can carry water on both shoulders by insisting that retireees are employees on one hand while denying them the substantial rights accorded all other employees by the Act on the other, remains a total mystery. Yet it was and is the *workers* whom Congress has sought to protect with regard to these rights. They are the ones whose fate affects commerce.

Summarizing, retirees' status does not affect commerce with respect to the establishment of any terms and conditions of employment whatsoever. Retirees do not "depress" wage rates; they receive no wages. They cannot cause or be subject to any diminution in employment; they are not employed. They have no interest whatsoever in such common in-shop matters as seniority systems, work assignment policies, incentive rates, overtime handling, job change or establishment, holiday or vacation benefits, plant safety, foremen working, and a host of other matters which customarily comprise the bulk of the typical labor contract. They do not go on strike; they are not working. Their pension benefits are fixed and unchangeable by contract at the time they retire and, indeed, are technically paid not by their former employer but by trustees or insurance companies with whom the employer has made arrangements for such payments.

Retirees have so little in common with active employees that it is a sheer travesty to label them as in the same category. They have absolutely none of the typical indicia of employee status. Their status is so markedly different from employees that no reasonable individual could possibly so consider them. Bargaining on their behalf (if that

is indeed what the unions want to do) can have no effect on commerce whatever. It can cause no industrial strife or unrest whatever because no strike of retirees is possible. They are completely out of the labor market, not to mention the bargaining unit they once were members of.

There is so tenuous a connection at best, through the receipt of certain benefits, that this Court is not warranted in escalating it into employee status. They have no need of protection; their contract for retirement benefits, for which they have already bargained, assures them of that. They can have no employee status; part of the bargain previously made on their behalf is their departure from their former bargaining unit and their relinquishment of employee status in exchange for certain benefits. What they do or do not do thereafter has not even the remotest effect on commerce, and there is accordingly no statutory policy which would justify court or Board-ordered resumption of employee status, certainly not on the basis of changing or misreading the plain words of the English language, as is here attempted. In short, retirees are, by prearrangement, departed from, not a part of, the labor market and cannot possibly claim to be part of it on the mere basis of receipt of certain benefits which are in reality nothing but the consideration for their staying out of the labor market.

It is thus clear that retirees are not employees as that term is used in the law. They are given no rights under Section 7 of the Act, and cannot claim the protection thereof. Nor is there any obligation on the part of their former employer, with whom they now have a wholly different relationship than that of employee, to bargain with any purported representative of such non-employees. Neither the language; the policy; or the intent of the Act commands it, and it is not for the NLRB or the courts to read into the law what Congress has explicitly said should not be there.

III. There Is No Evidence That Practice In Industry Generally or Otherwise Is To Bargain On Retired Employee Benefits.

It is the normal custom for the NLRB as the agency charged with administration of the Act, to rule in any given instance on the basis of record evidence. Therefore, in the light of the Board's efforts to enlarge the scope of the Act, in respect to the type of individuals subject to its jurisdiction, it might have been thought that a major portion of the Board's case would at least have been supported by factual record evidence.

No such assumption could possibly be made with regard to the conclusion of the Board that (177 NLRB #114):

> "Many employers and unions now bargain about pension and benefits for retired employees, reflecting a widespread understanding of the law shared in industrial circles and among members of the labor relations bar."

The Board supports that astonishing assertion in two ways, neither of them factual in any sense whatsoever.

First, it merely cites two arbitration decisions, one by Professor Archibald Cox, *United Drill & Tool Corp.*, 28 L. A. 677 (1957), the other by Arbitrator Sam Kagel in *Pacific Maritime Ass'n.*, 28 L. A. 600 (1957). Neither of them furnishes the slightest scrap of buttressing or support for the conclusion it draws.

Professor Cox's award was merely an interpretation, in a grievance arbitration, of a contract clause. The issue did not involve any refusal to bargain or any other unfair labor practice whatever under the LMRA, but simply a question as to whether *one employer* and *one union* had in fact so conducted their contract negotiations as to agree on a clause therein which covered retirees. It should be noted that Arbitrator Cox was clothed with no more than the usual

arbitral authority to interpret and apply the contract before him, not to fashion a new agreement and certainly not to rule on the question of whether or not unfair labor practices had been committed. He was given no mandate or commission to ascertain whether or not the practice in industry was or was not to bargain on such a question. It was noted in passing, and as dicta to the award, that there had been some bargaining in some industries on this question, but this itself was not supported by record evidence and cannot be used as substitute therefor by the Board. Certainly Professor Cox did not so rule. The main point of the award, moreover, is studiously and carefully ignored by the Board, because it reflects Professor Cox's view that, in such cases as this, involving retirees,

> "*The absence of a statutory duty to bargain* is not enough to invalidate [employer's] promise."

Cox also states therein that even common practice can hardly change the law, a point also studiously ignored by the Board in its anxiety to change it.

The Cox award, then, is not only no authority or warrant for the Board's conclusion, but it actually flatly contradicts and denies the Board's major premise in this case; that there is a statutory duty to bargain over retirees' benefits. Professor Cox himself is authority for the proposition that industry practice cannot bring about the existence of a statutory duty not found in the law; and also that such statutory duty may very well not exist at all. Nor can he be said to rule that industry generally bargains over retirees; his award is very limited and non-factual in that area.

The other award cited by the Board involves not even a matter of contract interpretation, let alone any question of mandatory bargaining, but merely the size of an employer's contribution to a welfare fund, which in fact existed for providing life insurance for both active and retired "men" (not "employees"). It cites no practice, makes no claim

or reference of any kind towards mandatory bargaining, and cannot possibly stand as support for the Board's conclusion.

These two arbitration awards are the main basis used by the Board for its conclusion as to industrial practice. This maneuver in itself would shock one's legal conscience. But, since these cases are readily eliminated as a *valid* basis of support for the Board ruling, the conclusion must necessarily fall, unless some other valid prop for it appears. *There is concededly not one shred of record testimony or evidence on which the Board conclusion upholding retiree bargaining is based.* No one on either side adduced any facts whatever to shore up the Board's conclusion; it follows that it must be withdrawn from consideration by this Court as a matter of law because the mere assertion is not a finding but a mere claim without proof or factual underpinning. Where such claim by the Board becomes a substantial factor in the rendering of its ruling, the only possible action by this Court should be a dismissal on the record as a whole because of utter lack of evidence on such a major point.

It is, of course, true that some of the *amicus curiae* briefs below alleged "many instances in which bargained increases in benefits have been obtained for retired workers." These statements, too, remain mere assertions, unproven and unprovable; they should not have been even considered in reaching a decision below for that reason alone. It is hardly an appropriate or useful means of policy-making to depend on such self-serving documents, and the outcome is hardly worthy of the standards which we have a right to expect from a government agency charged with so delicate and complex a task as administering national labor policy.

Indeed, the folly of relying on not-disinterested *amicus curiae* briefs to supply the facts that the record evidence does not do is evident from the considerable stress laid in such briefs to the Board on the supposition that General Electric Corporation bargained in fact over retired em-

ployee benefits. Yet General Electric itself flatly contradicted such claims in a letter to the Board which wrung an unwilling apology for its error from the most flagrantly mis-stated *amicus curiae* briefs.

The other sources cited in support of the Board's conclusion basically do not stand for the proposition that there is a general practice of bargaining, mandatory or otherwise, *over changes in retired employees' benefits,* but merely show (even if taken at face value) that there have been changs in such benefits from time to time after certain individuals have retired. This is really characterized by the Board, not as a practice in support of mandatory bargaining, but merely as "showing a broad potential need for union bargaining with regard to" retirees. Assuming the existence of a need, it does not warrant changing the law by administrative fiat. This argument should be addressed to Congress, not to the adjudicative bodies.

Indeed, much of the so-called practice of bargaining over retirees' benefits is actually not that at all but merely normal routine bargaining over changes in such benefits for employees *currently on the payroll in the appropriate unit.* The very considerable confusion on this point has obviously been fostered by the Board and the *amicus curiae* as a means of shortcutting normal procedures of securing evidence.

Surely no one can be allowed to ignore so fundamental a bastion of our current legal system as the requirement of record evidence to support a result in favor of a dubious expediency. If the proposition the Board here seeks to establish in fact is valid, no need for such rejection of long-term legal standards would be necessary. The absence of adherence to them bespeaks a rickety structure which should not be allowed to endanger its supposed beneficiaries.

Moreover, the alleged practice is not as widespread as alleged. General Electric has validly and without dispute disclaimed adherence to any such practice. Union Carbide

does not bargain for retirees and has not ever done so. Other chemical companies do not bargain with their unions for retirees or over retiree benefits. Numerous other companies in a broad cross-section of American industry do not bargain for retirees. The practice is, if it indeed exists, far more scanty than assumed by proponents of its expansion; indeed, perhaps for that reason the Board merely cited a "need for bargaining" in this area. But to cite a need for a particular practice is also to cite its current absence.

A need, then, is not a practice but the very antithesis thereof. And a practice does not change the law. The fact that many people may violate traffic laws does not render them automatically invalid; such a proposition would have appeared too elementary to have even required restating. But the Board evidently thinks otherwise; even though by seeking to establish such a proposition it also is establishing a two-edged sword. It is all well and good to cite a "practice" in order to *extend* the law; but then it should be equally well and good to cite a practice as warranting *invalidation* of an existing law, however desirable. No one has seriously contended for such a principle; yet it stands on no worse a footing than that for which the Board contends. Laws are passed or repealed by legislatures, not by adding up the sum of popular practices, in the last analysis.

It is clear, therefore, that the practice of bargaining over retiree benefits has not one scintilla of evidential support in the record and so, as a matter of law, cannot be considered as any basis for the Board's position. Yet its posture contains clear indication that the Board relied heavily on what necessarily must remain a mere non-factual claim. The so-called practice cannot even be discerned from the matter alleged in the sole source of such allegations, the *amicus curiae* briefs. There is, also, substantial contrary evidence available that the so-called practice is far from being as widespread as claimed. Moreover, the two arbi-

tration awards cited are no support at all for the Board's conclusion. And, finally, even assuming what is obviously not the case, that a practice exists, such practice cannot expand the scope of the NLRA, or serve to revise the definition of "employee" therein. As the Court below states, it forms no basis for changing the Act.

Conclusion

For the reasons set forth above, Union Carbide Corporation, as *amicus curiae,* respectfully urges that the petition for review of the Court's order below be denied.

Respectfully submitted,

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APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C., Secs. 151, *et seq.*) are as follows:

SEC. 2. When used in this Act—

* * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicity states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8(a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of Section 9(a);

* * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultane-

ously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of Section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.

* * *

SEC. 9(a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

Relevant provisions of Title III of the Labor Management Relations Act, 29 U. S. C. 186, are as follows:

SECTION 302(c). The provisions of this section shall not be applicable

* * *

(5) with respect to money or other thing of value paid to a trust fund established by such representa-

tive, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; or (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose

of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training program: *Provided,* That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds.[1]

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[1] Section 302 (c) (6) was added by the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 537, 539, to remove doubts theretofore existing as to apprenticeship and training programs and as to vacation, holiday, severance or similar benefits. H. Rep. No. 741, 86th Cong. 1st Sess., pp. 46-47, II Leg. Hist. of the Labor-Management Reporting and Disclosure Act of 1959, Washington, 1959, pp. 804-805.